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NO. 82-5528

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JANICE BUTTRUM,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
REASON FOR NOT GRANTING THE WRIT	
I. THE TRIAL COURT PROPERLY ALLOWED AN EXPERT WITNESS TO TESTIFY FOR THE STATE DURING THE SENTENCING PHASE OF PETITIONER'S TRIAL CONCERNING HIS OPINION OF THE PETITIONER'S MENTAL CONDITION AND FUTURE DANGEROUSNESS	7
CONCLUSION	16
CERTIFICATE OF SERVICE	17

QUESTION PRESENTED

1.

Whether the trial court properly allowed an expert witness to testify for the state during the sentencing phase of Petitioner's trial as to his opinion of the Petitioner's mental condition and future dangerousness?

TABLE OF AUTHORITIES

Cases cited	Page(s)
Buttrum v. State, 249 Ga. 652 (1982)	1
Estelle v. Smith, 451 U.S. 454, 68 L.Ed.2d 359, 101 S.Ct. 1866 (1981)	7, 10
Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972)	8
Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976)	7, 8, 12
Jurek v. Texas, 428 U.S. 262, 49 L.Ed.2d 929, 96 S.Ct. 2950 (1976)	9, 11, 12
United States ex rel. Smith v. Baldy, 344 U.S. 561, 97 L.Ed.2d 549, 73 S.Ct. 391 (1953)	14

Statutes cited	
Fed. R. Evi. 703	13
O.C.G.A. § 15-10-30(b) (Michie 1982); Ga. Code Ann. § 27-2534.1(b) (Harrison 1977)	12
O.C.G.A. § 17-10-2(c) (Michie 1982); Ga. Code Ann. § 2503(b) (Harrison 1977)	8
O.C.G.A. § 17-10-30(b)(2) and (7) (Michie 1982); Ga. Code Ann. § 27-2534.1(b)(2) and (7) (Harrison 1977)	1, 8

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PART ONE

STATEMENT OF THE CASE

Petitioner, Janice Buttrum, was indicted in Whitfield County, Georgia, during the July Term, 1980, for the murder of Demetra Faye Parker and the theft of her motor vehicle. Petitioner was tried by a jury and found guilty of both offenses. Petitioner was sentenced to death for the murder upon a finding of O.C.G.A. § 17-10-30(b)(2) and (7) (Michie 1982); Ga. Code Ann. § 27-2534.1(b)(2) and (7) (Harrison 1977).

On direct appeal to the Supreme Court of Georgia, Petitioner's convictions and sentences were affirmed. Buttrum v. State, 249 Ga. 652 (1982). The instant petition for a writ of certiorari was then filed by the Respondent.

PART TWO

STATEMENT OF FACTS

The jury was authorized to find that nineteen year old Demetra Faye Parker was savagely raped, sodomized and stabbed ninety-seven times in her motel room at the Country Boy Inn, in Whitfield County, Georgia, during the early morning hours of September 3, 1980. Demetra Parker had lived in Tennessee, but had come to Georgia to be near her boyfriend. On the evening before her death, September 2nd, Ms. Parker arranged to meet two friends. (T. 512, 1519). Ms. Parker and her companions spent approximately two hours together at Demetra's motel room watching television. During this visit, Appellant's husband, Danny Buttrum, was observed pacing back and forth approximately fifteen to twenty times outside Demetra's room. (T. 1513, 1516, 1520). Demetra told her friends that she was fearful of Mr. Buttrum and they locked the door. At approximately 8:30 p.m. Ms. Parker drove her guests home. (T. 1513-1514, 1520).

Christopher Busby lived at the Country Boy Inn during August and September of 1980. Appellant and her husband also had a room, Room No. 243, at the same motel. (T. 1539, 1540, 1549, 1624). Mr. Busby and Mr. Buttrum visited with each other during Tuesday, September 2, and drank a beer together. During this time, Ms. Parker drove Appellant to the store and to the laundromat. (T. 1417, 2046, 2059).

At approximately 7:00 to 7:30 p.m., Mr. Buttrum, Appellant and their baby, along with Mr. Busby, left the motel to purchase beer. (T. 1514, 1552). The three adults and the child drove around in Mr. Busby's blue and white Ford Torino and tried to "get him a girl" at Danny Buttrum's request. (T. 1539, 1544). When questioned if Appellant would become angry, Mr. Buttrum stated, "No, as long as she gets to go with her first." (T. 1395, 1544).

Female witnesses testified that Mr. Buttrum came to visit them during the late evening hours of September 2, 1980 and that they observed a woman seated in the back of the car. Danny Buttrum was unable to make arrangements with any of the women and returned to the motel with Appellant, their child and Mr. Busby. (T. 1546, 1570-1572, 1578, 1598). Mr. Busby then loaned Mr. Buttrum his car, which was returned at approximately 3:45 a.m. on September 3, 1980. (T. 1546, 1547).

During the early morning hours of September 3, Appellant and her husband went to Demetra's room, No. 253, at the Country Boy Inn in Dalton, Georgia. (T. 1394, 1435, 1624-1625). Appellant, while holding her baby, knocked on Demetra's door and when Ms. Parker answered, the couple rushed inside. While Mr. Buttrum struggled with Demetra, Appellant adjusted the lights and closed the door. (T. 1394, 2049, 2090).

Appellant began to stab Demetra with a Barlow brown and white knife after Mr. Buttrum wrestled the victim to the ground. (T. 1436, 2092, 2106). Appellant repeatedly stabbed Ms. Parker, whereupon, Appellant's husband took the knife and continued the attack. (T. 1394, 1436, 2104). Mr. Buttrum and Appellant took turns stabbing their victim, (T. 1394) and while Appellant was stabbing Demetra, her husband was masturbating. (T. 1436). When Ms. Parker refused to die, Appellant cut her across the stomach to kill her, "because it was the only place to cut," and "that girl sure didn't want to die." (T. 1394, 1436). As a final sadistic touch, Appellant's husband picked up a cylindrical toothbrush holder and pushed it into Demetra's vagina. (T. 2052). Only then did Appellant and Mr. Buttrum pick up their child from the motel room floor, along with Demetra's ring and pocketbook and finally leave the room. (T. 1436). Appellant and her family returned to their motel room to wash off Demetra's blood and they then fled in Ms. Parker's 1975 Buick Riviera. (T. 1436, 2100).

Dr. James Metcalfe, Associate Pathologist at Hamilton Memorial Hospital, performed the autopsy on Demetra Parker. (T. 1380, 1451-1453). Demetra was 5' 8 1/2" and weighed approximately 100 lbs. She incurred sixty-seven stab wounds to her left chest with a maximum depth of 2". The blade penetrated several ribs and her left lung. Dr. Metcalfe observed twenty-four stab wounds and cuts in the front neck area with several cuts to the windpipe. (T. 1451-1456). Spinal stab wounds were 2" deep and cut into the back bone. A gapping gash had been inflicted to Demetra's lower abdomen exposing her bowels. (T. 1456). Demetra suffered a 4" cut in the genital area, as well as damage to the vagina and rectum from forcible penetration. (T. 1456, 1459, 1473). Hemorrhages and bruise marks were observed on Demetra's scalp, nose, knees and genital region. (T. 1457). Finally, there was a 1" to 1 1/2" bite mark on her neck. (T. 1457, 1467).

Dr. Metcalfe stated that the vast majority of injuries around the vagina and anus occurred while Demetra was alive. (T. 1468). Demetra died only after the attack or at the very end of the prolonged assault. (T. 1469). The stab wounds to the chest and neck finally resulted in her death. (T. 1467-1468).

Special Agent Charles Johnson of the GBI investigated the murder. (T. 1373-1374). He found bloody towels, panties and other items in Demetra's room. (T. 1375). Mr. Chambracant Patel, the manager and owner of the Country Boy Inn, informed investigators that he had discovered Demetra's body. (T. 1610). Mr. Patel also found the key to Appellant's room on the motel front desk and after investigating, determined that Appellant had abandoned her room. (T. 1609, 1612). Mr. Patel admitted investigators to Appellant's empty room. (T. 1377). A bar of soap and a pink washcloth both covered with blood were found in the sink of Appellant's room. (T. 1377-1378).

Forensic Serologist Connie Pickens examined the evidence and a blood sample from Demetra Parker. (T. 1476-1479). Demetra had Type O blood, which was the same type of blood as the blood stains found on the physical items of evidence including the pink washcloth in Appellant's abandoned room. (T. 1479-1480, 1485). Forensic Serologist John Wiegel, Jr. found the blood enzymes on the pink washcloth to be consistent with Demetra's blood enzyme makeup. (T. 1493-1502).

At approximately 5:00 a.m. on September 3, Appellant, her husband and child drove to the truckstop where Mr. Buttrum worked. (T. 1592). Appellant attempted to borrow money but was unsuccessful. (T. 1592). Appellant was finally able to get $20.00 from the truckstop manager. (T. 1598-1603). Appellant stated, "I don't know if you know what's going on or not, but we're in a hurry. And if Mr. Teems or anyone ask you, you have not seen us." (T. 1602-1603).

Special Agent Willard Dodd of the GBI contacted Appellant's mother-in-law on Wednesday, September 3. Mrs. Buttrum had given the couple money at approximately 6:00 a.m. that morning. (T. 1421-1423). Appellant contacted Mrs. Buttrum by telephone the following morning from Pensacola, Florida, requesting that more money be wired to the local Western Union Office in Florida. (T. 1425). Appellant and her husband were arrested on September 4th in Pensacola as they attempted to pick up the money that had been wired to them. (T. 1428-1431). Appellant gave the ring and barrette that she had taken from the victim to Agent McPaul. (T. 1436-1437, 1442). Appellant stated, "Should you feel some remorse when you kill somebody?" because she didn't feel anything. (T. 1417). Appellant was advised of the Miranda warning and signed a waiver form. (T. 1434-1436, 1616-1621, 1624-1625). Appellant thereafter read and signed her confession. (T. 1622-1623, 1625).

Whitfield County Sheriff's Department jailer John Parker received a letter written by Appellant while she was incarcerated requesting that the communication be given to the proper authority. (T. 1632-1646). Appellant wrote that she killed Demetra Parker as an unwarranted act of jealousy and that she made her husband do everything he did, including the rape of Demetra Parker. (T. 1644).

Appellant did not testify during the guilt/innocence phase of her trial. The jury found Appellant guilty of murder and theft of a motor vehicle. (T. 1770). The defense attempted to establish Appellant's impoverished childhood background, replete with neglect, victimization by her stepmother, and non-existent home hygiene during the sentencing phase of the trial. (T. 1937-1941, 1949-1952, 1960-1967, 1968-1973, 1973-1982). Appellant was characterized as being non-violent, passive, withdrawn and having a low self image. (T. 1979, 2005, 2017). Witnesses testified, however, that the observations attested to were based on familiarity with Appellant during 1977 and from Appellant's early elementary school years. (T. 1950-1951, 1961, 1968, 1982, 2000). Furthermore, one witness stated that not many neglected children commit murder and that many children in similar situations lead good lives. (T. 1942, 1947). When questioned about Appellant's capacity to commit such a crime, Unit Director of the Bartow County Juvenile Court, Wanda Holstein, stated, "I would have to do more of a study of what's happened in Janice's life since I worked with her." (T. 1997). Appellant was characterized as an individual who "would make decisions that would give her the most pleasure, without really giving any consideration to the consequences." (T. 2008).

Appellant testified during the sentencing phase of her trial that her husband would do anything when he had been drinking. (T. 2041). Appellant admitted stabbing the victim because she was hurt and angry. (T. 2051). Appellant denied

having oral sex with the victim and also testified that the letter she had written while in jail was not true. (T. 2055, 2088). Appellant alleged that she did not remember making the statement she had made to the authorities. (T. 2098).

Clincial Psychologist Henry Adams testified at trial that Appellant has an anti-social personality as well as symptoms of paraphilia sexual sadism. (T. 1804, 1822, 1835). This type of individual becomes excited by the suffering, humiliation and pain of the victim, especially from a non-consenting individual. (T. 1814-1816). Dr. Adams further testified that the behavior was a repetitive type of activity that continues until the person is apprehended or stopped in some way. (T. 1822-1823).

PART THREE

REASON FOR NOT GRANTING THE WRIT

I. THE TRIAL COURT PROPERLY ALLOWED AN EXPERT WITNESS TO TESTIFY FOR THE STATE DURING THE SENTENCING PHASE OF PETITIONER'S TRIAL CONCERNING HIS OPINION OF THE PETITIONER'S MENTAL CONDITION AND FUTURE DANGEROUSNESS.

Petitioner contends that the Eighth and Fourteenth Amendments bar the admission of expert witness testimony regarding the likelihood of a defendant's commission of future acts of violence. To support her argument that such expert testimony is inherently unreliable, Petitioner cites extensively the amicus curiae brief submitted by the American Psychiatric Association in Estelle v. Smith, 451 U.S. 454, 68 L.Ed.2d 359, 101 S.Ct. 1866 (1981).

Under the Georgia statutory scheme, which this Court held to be constitutional in Gregg v. Georgia, 428 U.S. 153, 49

L.Ed.2d 859, 96 S.Ct. 2909 (1976), the procedure for allowing testimony during the sentencing phase of a capital trial is set forth as follows:

> In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law . . .

O.C.G.A. § 17-10-30(b) (Michie 1982), Ga. Code Ann. § 27-2534.1(b) (Harrison 1977).

Considering this portion of the Georgia statute, this Court, in Gregg v. Georgia, Id., approved the Georgia procedure which allows the use of non-statutory aggravating or mitigating circumstances during the sentencing phase of the bifurcated trial, even though those circumstances are not delineated in the statute. Id. at 164. This Court held that the Georgia death penalty statute, which authorizes the jury to consider appropriate non-statutory aggravating circumstances during the sentencing phase, is constitutional. In discussing this issue, this Court noted that the Georgia statute allows the jury to consider the circumstances of the crime and focuses the jury's attention on the characteristics of the person who committed the crime. Id. at 197. Thus, this Court held that the Georgia sentencing procedures were constitutional and did not possess any of the defects previously outlined by the Court in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972).

In the instant case, pursuant to O.C.G.A. § 17-10-2(c) (Michie 1982), Ga. Code Ann. § 27-2503(b) (Harrison 1977), the state, after proper notice to the Petitioner introduced the expert testimony of Dr. Henry Adams, a clinical psychologist who chaired the Division of Social and Behavioral Science at

the University of Georgia. (T. 1804). Dr. Adams testified that after reviewing FBI reports, the Petitioner's confessions,reports from Central State Hospital, the autopsy report, and photographs of the victim, he compiled a professional study of the Petitioner. (T. 1817-1818). Dr. Adams testified that the report he reviewed from Central State Hospital included a social history of the Petitioner, a psychiatric report, a psychological evaluation, and ward notes. (T. 1818). Based upon Dr. Adams' study and upon his expertise in this field, Dr. Adams testified that it was his opinion that the Petitioner possessed an anti-social personality as well as exhibiting paraphilia sexual sadism. (T. 1822). Dr. Adams also testified that based upon his investigation of Petitioner and his expertise in this area, it was his opinion that individuals who exhibited this form of behavior were likely to repeat their acts. (T. 1823).

Dr. Adams was subjected to a thorough and sifting cross-examination by Petitioner's defense counsel. On cross-examination, Dr. Adams testified that he was aware that other experts who had evaluated Petitioner reached a conclusion of no medical diagnosis of a mental disease. (T. 1826-1828). Also on cross-examination, Dr. Adams testified that he had not personally examined the Petitioner, but that it was fairly common for a diagnosis to be made based upon information other than a personal examination. (T. 1824). Dr. Adams did testify that he would "feel much more comfortable" about the accuracy of his opinion had he actually examined the Petitioner. (T. 1825).

Petitioner alleges that such expert testimony relating to the future dangerousness of a capital defendant is inherently unreliable and should never be admitted in the sentencing portion of capital cases. However, contrary to Petitioner's argument, this Court, in Jurek v. Texas, 428 U.S. 262, 49

L.Ed.2d 929, 96 S.Ct. 2950 (1976), held that the imposition of a death sentence under the Texas death statute was constitutional. The Texas capital sentencing procedure requires the jury, during the sentencing phase of the trial, to answer three questions before a sentence of death can be imposed. One of these questions forces the jury to determine whether it is probable that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Id. at 268.

In Estelle v. Smith, supra, this Court again considered whether expert testimony about a capital defendant's future dangerousness was properly admissible at the sentencing portion of a capital trial. In Smith, this Court held that it was improper to admit testimony of a psychiatrist during the penalty phase of a capital murder trial where the defendant was not advised before the pretrial examination that he had a right to remain silent and that any statement he made could be used against him, and where defense counsel were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness. Id. at 468-469. In reaching this conclusion, however, this Court did not accept the argument advanced by the American Psychiatric Association in its amicus curaie brief, and relied upon by Petitioner in the instant case, that testimony of a capital defendant's likelihood to commit future criminal acts was inherently unreliable. Rather, this Court explicitly stated that, "Our holding based on the Fifth and Sixth Amendments will not prevent the State in capital cases from proving the defendant's future dangerousness as required by statute" Id. at 472. The Court noted that:

> Prediction of future criminal conduct is an essential element in many of the

> decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those senteced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice.

Id. at 473, quoting Jurek v. Texas, supra at 275-276.

Respondent submits that contrary to Petitioner's argument, expert testimony relating to a defendant's future dangerousness does not violate the defendant's constitutional rights. Rather, this Court explicitly approved such testimony in determining that the Texas death penalty statute, which on its face requires such a showing, is constitutional. Also, in holding that the Georgia death penalty scheme is constitutional, this Court has approved a procedure whereby the state is allowed to introduce non-statutory aggravating evidence during the penalty phase of the bifurcated trial. Respondent notes that under the Georgia death penalty statute, the defendant is given an opportunity to present any mitigating

circumstances during the penalty phase of the trial. O.C.G.A. § 15-10-30(b) (Michie 1982), Ga. Code Ann. § 27-2534.1(b) (Harrison 1977). In the instant case, following Dr. Adams' expert testimony, the Petitioner presented lengthy mitigating evidence which brought to the jury's attention her youth and her deprived social background.

Respondent submits that under the Georgia statutory scheme for the imposition of the death penalty, expert testimony relating to a defendant's future dangerousness is properly admitted as non-statutory aggravating circumstances. Such testimony can, and was in the instant case, be rebutted by mitigating testimony presented by the defendant. Petitioner has shown no reason to require this Court to reverse its previous holdings in Gregg v. Georgia, supra and Jurek v. Texas, supra, which sanctioned such testimony.

Petitioner next moves from the general argument that expert testimony relating to future dangerousness is always inadmissible to a specific argument that such testimony was inadmissible at her trial. Specifically, Petitioner alleges that Dr. Adams' testimony was improperly admitted because he had never personally examined or interviewed her and because his testimony allegedly was based upon hearsay and materials not in evidence. Petitioner also alleges that the trial court improperly refused the Petitioner's request for an independent psychiatric examination at state expense.

These issues were addressed by the Supreme Court of Georgia on the direct appeal of Petitioner's conviction. In its opinion, the Georgia Supreme Court held:

> It has long been the rule in this state that an expert witness may give his opinion as long as he states the facts on which he bases his conclusion. The fact that an expert's opinion may be based in part on facts not in evidence goes to the

> weight and credibility, not to its admissibility. Redfield v. State, 240 Ga. 460 (1) (241 S.E.2d 217) (1978) and cases cited. There is no merit to this enumeration of error.

Buttrum v. State, supra at 655.

Although the Petitioner claims that Dr. Adams based his conclusions upon items which were not in evidence before the jury, this contention asserts form over substance. Testimony as to the substance of Appellant's confessions had been placed before the jury during the guilt/innocence phase of her trial, along with the testimony of FBI agents as to the arrest and interrogation of Appellant, photographs of the victim, and testimony as to the findings of the medical examiner. Thus, the great majority of evidence upon which Dr. Adams based his opinion had previously been admitted into evidence and considered by the jury.

Respondent additionally notes that Dr. Adams' testimony would be admissible not only under the principles of Georgia law, but also under the Federal Rules of Evidence. Fed. R. Evi. 703 specifically states that:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing if of a type reasonably relied upon by experts in the particular field informing opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Thus, Respondent submits that Dr. Adams' testimony was properly admitted under both state and federal rules of

evidence, and that Petitioner's constitutional rights were not violated by the admission of this testimony.

Petitioner's allegation that the trial court improperly allowed Dr. Adams to testify at her sentencing trial without also providing her with additional funds to employ an independent expert in the preparation of her defense was also found to be without merit by the Supreme Court of Georgia on direct appeal. Appellant alleges that an independent psychiatric expert was necessary for a fair and adequate opportunity to defend herself against Dr. Adams' testimony. However, Respondent notes that prior to Appellant's trial on the issue of her competency, the trial court had ordered the Appellant to be examined. Appellant was given extensive testing and examination by staff members from two hospitals. At its hearing on Appellant's motion for appointment of an independent psychiatrist to participate in the defense, which was held after Petitioner was given notice of Dr. Adams' testimony, the trial court noted that Petitioner had already been examined by a psychatrist whose opinion differed from Dr. Adams' opinion. The doctors who had previously examined Petitioner were available for subpoena to refute Dr. Adams' opinion. In United States ex rel. Smith v. Baldy, 344 U.S. 561, 97 L.Ed.2d. 549, 73 S.Ct. 391 (1953), this Court held that, contrary to Petitioner's assertion, a criminal defendant is not entitled to an endless search for a favorable psychiatric diagnosis at public expense when substantial and competent evidence already has been obtained. Id. at 568.

Respondent submits that contrary to Petitioner's allegation, the trial court properly allowed expert testimony during the sentencing phase of Petitioner's trial relating to Petitioner's future dangerousness. Dr. Adams was subjected to a thorough cross-examination by Petitioner's counsel, and in rebuttal of his testimony, Petitioner was given access to other state officials who had examined Petitioner and whose opinion

varied from Dr. Adams' opinion. Also, in rebuttal of Dr. Adams' testimony, the Petitioner presented lengthy evidence in mitigation.

Respondent submits that expert testimony concerning the future dangerousness of a criminal defendant is properly admissible in the sentencing phase of a capital trial, and that there were no factors in Petitioner's trial which rendered such testimony inadmissible.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia as it is manifest that no substantial federal question not previously decided by this Court is presented and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William B. Hill, a member of the Bar of the Supreme Court of the United States and Counsel of Record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for the Respondent in Opposition by depositing three copies of same in the United States mail, with proper address and adequate postage to:

Margery Malkin Koosed
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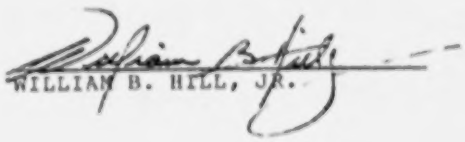
This 10th day of November, 1982.



WILLIAM B. HILL, JR.